

**Billing Code 4210-27P**

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**

**[Docket No. FR-4883-N-02]**

**HUD Multifamily Rental Project and Health Care Facility  
Closing Documents: Revisions and Updates and  
Notice of Information Collection**

**AGENCY:** Office of the Assistant Secretary for Housing--Federal Housing Commissioner, HUD.

**ACTION:** Notice.

**SUMMARY:** Consistent with the Paperwork Reduction Act of 1995, HUD is publishing for public comment a comprehensive set of closing forms and documents for use in the Federal Housing Administration (FHA) multifamily rental project and health care facility (excluding hospitals) programs. In addition to meeting the requirements of the Paperwork Reduction Act, this notice seeks public comment for the purpose of enlisting input from the lending industry and other interested parties in the development and adoption of a set of instruments that offer the requisite protection to all parties in these FHA-insured mortgage programs, consistent with modern real estate and mortgage lending laws and procedures. The development of these forms identified outdated language and policies in HUD regulations that needed to be changed. Accordingly, elsewhere in today's Federal Register, HUD is publishing a proposed rule that solicits comments on changes to certain FHA regulations as described in the preamble to that rule.

**DATES:** Comment Due Date: [Insert date 60 days from the date of publication in the Federal Register].

**ADDRESS:** Interested persons are invited to submit comments regarding this notice to the Rules Docket Clerk, Regulations Division, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500.

Communications should refer to the above docket number and title. Facsimile (FAX) comments are not acceptable. A copy of each communication submitted will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address.

**FOR FURTHER INFORMATION CONTACT:** Gains E. Hopkins, Jr., Office of the General Counsel, Room 9230, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500; telephone (202) 708-4090 (this is not a toll-free number). Persons with hearing or speech disabilities may access this number through TTY by calling the toll-free Federal Information Relay Service at (800) 877-8339.

**SUPPLEMENTARY INFORMATION:**

**I. Background.**

A. General Summary of Changes to HUD Multifamily Rental and Health Care Facility Closing Documents.

It 1999, HUD developed the Multifamily Accelerated Processing (MAP) initiative. It was during the MAP development process that HUD noted that the multifamily rental project and health care facility closing forms had not been amended or revised in any significant fashion since the 1960s. It became clear during the development of MAP that all of HUD's multifamily closing forms required thorough review and comparison to modern day instruments to offer the requisite protection to all parties to the transaction, consistent with modern real estate and

mortgage lending laws and procedures. Consequently, five committees consisting of experienced HUD closing attorneys were assembled to review the closing documents and to advise HUD's Office of Housing about improvements and recommendations. With input from HUD attorneys, FHA multifamily lenders, and counsel to parties to HUD-insured transactions, HUD determined how the forms could be revised to reflect current departmental policy and current real estate and mortgage financing practice. First drafts of revised closing documents were posted on a HUD website at the end of March 2000, and comments were solicited from the public and industry representatives. In response to the many comments received, significant changes were made to several of the draft documents and those changes are incorporated in the drafts being published with this notice.

The revised documents being published for public comment as part of this notice do not include the forms for HUD's Section 202 Housing for the Elderly (Section 202) program and Section 811 Housing for Persons with Disabilities (Section 811) program. Documents for the Section 202 and Section 811 programs will be revised in the near future.

The major changes to the appended closing documents are discussed in this notice. Terms that appear in this notice that begin with an initial capitalization refer to the titles of closing documents are defined terms in the closing documents. Though major changes were made to several of the documents, HUD strived to keep all changes consistent within current HUD policy and the FHA regulatory framework except where otherwise identified in this notice. The requirements for commitment and endorsement of a mortgage note are provided in 24 CFR part 200, subpart A. Generally, the regulations in this part and subpart provide that where specific closing documents are referenced in the regulations the regulations provide that the documents shall be in a form as prescribed by HUD. The subpart also specifies other closing

requirements that are reflected in the closing documents. There are numerous instances where the existing documents have been clarified, expanded, or otherwise modified to reflect current HUD policy and regulations, which have changed since the documents were originally adopted. One example of such change pertains to the policy that FHA regulation of lessees of health care facilities will be to the same extent to which owners of health care facilities are regulated. This policy is set forth in the new health care facility regulatory agreement. Although HUD has always taken the position that any lessee or sublessee would be subject to the same regulatory controls to which the owner is subjected under a regulatory agreement, this is the first time that this policy has been clearly stated in writing. Comment is specifically invited on the proposed change in the closing documents. A change to HUD regulations to also reflect this policy is included in HUD's proposed rule, published elsewhere in today's Federal Register.

In addition to specific changes to individual documents, HUD advises that there are two separate Regulatory Agreement (RA) formats published with this notice. When the closing documents were published on the HUD website in March 2000, only one RA format was published at that time, and the single RA format covered both rental housing projects and health care facilities. The single RA format was developed as a result of public comment that the multiple RA formats, currently in use, are confusing, antiquated, and often misapplied. Since publication on HUD's website, separate formats were developed for (1) rental housing programs, and (2) health care facilities under Section 232 of the National Housing Act (NHA). Certain "rental" type modifications may be necessary to the health care facilities RA on a case-by-case basis to cover assisted living facilities (ALFs) and board and care homes (B & C homes) under Section 232. Certain provisions relating to admission, occupancy and security deposits, among others may need to be added depending on state law. The Section 232 RA also briefly mentions

an Admission Agreement, which is a type of lease between a resident of an ALF, B & C home, or Nursing Home. The description of this type of admissions agreement may need to be expanded further in certain documents depending on state law.

A major revision that HUD is considering and which is not reflected in the closing documents published with this notice is a consolidation of the various escrow forms. A consolidation would eliminate several forms which are very similar and for which the differences could be identified in a set of boxes to be checked. A frequent complaint of lenders and other users of the multifamily rental and health care facility mortgage insurance programs has been the confusing nature of too many similar forms.

The FHA Form 2446, Escrow Agreement for Off-Site Facilities, is not included in the attached documents. When the consolidated escrow forms are published the FHA Form 2446 will be included in the that publication and, if it is not appropriate for a consolidated escrow, or if a consolidated escrow form is not developed, the FHA Form 2446 will be updated since it was last revised in April, 1962. A consolidated escrow form would contain an escrow for minor moveables and the 12-month debt service escrow for Section 232 projects with independent units. If these provisions are not included in a consolidated escrow form, another separate escrow form will have to be developed. HUD invites public comment on this proposal. HUD is considering publishing a consolidated escrow form. A consolidated escrow form would represent a major change from the policy articulated in the current Section 232 lessee regulatory agreement.

An additional change made in the RAs and other relevant documents pertains to the definition of "principal." The term "tenants in common" is being removed from the definition of "principal" because HUD intends, as a matter of policy, to eliminate tenancies in common as

eligible mortgagor entities, except for tenancies in common comprised of one or more natural persons. No tenancies in common comprised of entities such as partnerships and limited liability companies, etc. would be eligible as mortgagors.

Two minor changes will be apparent in reviewing all the published forms but the reason for the changes may not be apparent. First, a decision was made to adopt a universal numbering system for the closing documents, e.g. HUD Form 9XXXXM, for the multifamily rental project and health care facility closing documents. A universal numbering system should reduce confusion because the documents will appear in the same group wherever HUD publishes the documents, e.g. HUDCLIPS. The second change is that the terms "lender" and "borrower" are used consistently throughout all the documents, except with respect to the title for the document "Mortgagee's Certificate". The terms "lender" and "borrower" are defined to mean "mortgagee" and "mortgagor" as those terms are used in the NHA. Formerly, the documents contained a variety of terms to refer to these parties; therefore, consistency more in line with modern real estate practice is anticipated to make the documents more easily understood.

Form HUD-3259, Latent Defects Bond, has not been included in the closing documents published with this notice and, like FHA Form 2446, HUD 3259 does not have the 90000M series number. Similarly, the Borrower's Cost Breakdown, HUD-2328, does not have a 90000M series number since this form was recently revised. When these forms are renewed, HUD will consider including the 3259 and the 2328 forms in the 90000M series. The FHA Form 2446 will be assigned a 90000M series number if it is not consolidated into a master escrow agreement as discussed above.

The description of the significant changes made to the individual closing documents follows. The documents are divided into two categories: major documents and miscellaneous

documents. Most of the major documents have been revised in some significant fashion. The miscellaneous documents generally have not been revised. Three new documents appear in the miscellaneous category, namely, the Escrow Agreement for Working Capital, the Sinking Fund Agreement, and the Escrow Agreement for Latent Defects (For Use with Completion Assurance Agreement).

The legal authority of HUD to implement these changes to documents is found in Titles II and IX of the NHA and in 24 CFR part 200 and the separate parts pertaining to each individual multifamily rental and health care program, including but not limited to 24 CFR parts 207, 220, 221, 232, 241, and 244.

#### B. Major Documents.

##### 1. Security Instrument (HUD 94000M).

The Security Instrument has been changed considerably from the numerous state-specific forms currently in use by FHA. The forms currently in use were developed in the early days of FHA and have not been changed in any significant fashion since the 1960s. Certain commenters have questioned the value of instruments that are not consistent with documents used by other agencies and the commercial real estate market. Perhaps the most significant criticism was that the current FHA form Security Instruments do not provide lenders with the necessary protection that a modern instrument would offer. In developing the new multistate format, HUD made every effort to carefully examine the provisions of the security instruments currently and compare them with those used in the commercial real estate lending market today. Particularly, HUD looked carefully at the Freddie Mac multistate format (which differs little from that used by Fannie Mae) as well as at recent developments in the law. Consequently, HUD developed a multistate format which is consistent with existing HUD administrative policy and which is also

consistent with modern lending and credit enhancement practices. In most areas, the multistate Security Instrument uses concepts in the existing FHA form documents and expands and clarifies them, as in the case of condemnation, property and liability insurance, single-asset borrower, books, records and financial reporting. The revised Security Instrument also clarifies for the parties to the Security Instrument which actions of the borrower and lender require HUD approval. The borrower and lender, however, remain the only parties to the Security Instrument, and HUD continues to have no direct contractual relationship with the owner with respect to the Security Instrument or to the Note. Further, the Security Instrument is organized along the same lines as the Freddie Mac instrument. State-specific addenda are being developed by HUD field counsel for the various jurisdictions and will need to be appended to the multistate format comparable to the approach taken by the Freddie Mac. The HUD state-specific addenda will differ significantly from the Freddie Mac addenda only in that there will be a provision governing construction advances in the HUD addenda since HUD insures construction advances, unlike Freddie Mac. This construction advances provision varies from state to state. Also, the HUD instrument is designed to cover health care facilities as well as rental housing projects unlike the Freddie Mac instrument, which is restricted to rental housing. The following provides a description of the major substantive changes that have been made and the section numbers cited in the following discussion refer to sections in the Security Instrument:

Personal Liability (Section 6). HUD has decided to hold key principals personally liable for the indebtedness, but only if they commit the following actions: the borrower ceases to be a single-purpose, single-asset entity without prior HUD approval; the borrower transfers the property without prior HUD approval; the borrower creates or permits to be created a lien or encumbrance without prior HUD approval; the borrower commits fraud or makes a material



misrepresentation to HUD or the lender; loss or damage suffered by the lender caused by the borrower's failure to pay Rents and security deposits it is obligated to pay; the borrower fails to apply insurance or condemnation proceeds as specified in the Security Instrument or to comply with requirements on the delivery of books, records and reports to the mortgagee. See also Sections 1(m), 1(p), 18, 23, 24, 45 and Section 8 of the Security Instrument.

Default (Sections 24 and 45). HUD has developed a new two-tiered default scheme: Class A for financial defaults, giving the lender an immediate right to an insurance fund claim, and Class B for all other bases for default, requiring the prior written approval of HUD for the lender to make an insurance fund claim. Class B defaults contains several new bases for default and are derived, in part, from the Freddie Mac model. The new bases include fraud or material misrepresentation or omission by the borrower, its officers, directors, trustees, general partners, members, managers or guarantors: (1) in the application for the HUD-insured loan; (2) in the application for financial assistance other than the HUD-insured loan that is included in the definition of "Indebtedness"; (3) in any financial statement, rent roll, or other report or information provided by the borrower during the term of the Indebtedness; and (4) in any request for lender's consent to any proposed action. Other new bases for default include the commencement of a forfeiture action or proceeding, which in the lender's reasonable judgment could result in the loss of the property or impairment of the lien.

Mandatory Acceleration (Section 10). HUD has decided to require the lender, when directed by HUD, to declare the entire Indebtedness due and payable following a declaration of default by HUD under the terms of the Regulatory Agreement.

Waste (Sections 1(y) and 47). HUD has augmented the common law and state law definitions of "Waste" with an expanded contractual definition of and corresponding remedies

for its commission. The definition of Waste includes the unauthorized modification of the property affecting value, failure to maintain the property, violation of covenants in the loan documents which require compliance with federal regulations regarding physical conditions standards, failure to pay certain taxes, and the wrongful retention of rents. This new definition is derived from The American Law Institute (ALI) in ALI's Restatement of the Law Third, Property (Mortgages) © 1997, and portions of that work are used with ALI's kind permission.

Assignment of Leases (Section 4). HUD has included an Assignment of Leases provision to the Security Instrument. In addition to the absolute assignment by the borrower to the lender of all leases on the subject property, this section sets forth the mandatory lease provisions for non-residential use of the property, including new requirements for all leases for telecommunication uses on the mortgaged property.

Health Care Facilities (Sections 1(g) and 1(q)(16)). HUD has revised the form of Security Instrument to include health care facilities. The changes are:

a. The title of the revised form is now known as the HUD Multifamily/Health Care Facility (Mortgage, Deed of Trust, or other designation as appropriate in jurisdiction), Assignment of Rents and Security Agreement.

b. The definition of Health Care Facilities at Section 1(g) has been expanded to include a comprehensive list of health care facilities authorized under the NHA or other applicable federal law.

c. The definition of "Mortgaged Property" at Section 1(q)(16) has been written to include all licenses, Bed Authority, and Certificates of Need required that are necessary to operate a facility and receive benefits and reimbursement from health care assistance providers that were relied upon by HUD to insure the Security Instrument.

Termination (Section 49). HUD added a provision to clarify that, at such time as HUD no longer insures the loan or holds the Security Instrument, all obligations of the parties to the Security Instrument terminate with respect to HUD, provided that the borrower is in compliance with the Regulatory Agreement, and the lender is in compliance with the Contract of Insurance.

Management Contracts (Section 20). HUD has decided to require any management contract to contain a provision that the contract shall be subject to termination without penalty and without cause upon written request of the lender.

Environmental Hazards (Section 51). HUD has decided to include a provision similar to the Freddie Mac model to provide protections to the lender with respect to environmental hazards.

## 2. Multifamily/Multistate Note (HUD 94001M).

The current version of the HUD Multifamily/Multistate Note is, for some states, approximately 30 years old. The HUD Multifamily/Multistate Note in some states, such as Pennsylvania, was modeled on a Fannie Mae note form from the late 1960's or early 1970's. The proposed new version of the mortgage loan HUD Multifamily/Multistate Note is based, in part, on the 1999 Freddie Mac multifamily note. The proposed HUD Multifamily/Multistate Note is essentially a new form of note. The text has been rewritten. Discussion of issues has been expanded. Topics have been better organized. The essential concepts remain the same. Substantively, there are no major changes except for the issue of personal liability. The proposed HUD Multifamily/Multistate Note is now directly linked to the proposed Security Instrument and cannot be read independent of that document. The HUD Multifamily/Multistate Note is to be used for multifamily and healthcare programs. Some consideration was given to a revision, which would be consistent with the Government National Mortgage Association (Ginnie Mae) electronic payment; however, the decision was that such a provision would be

confusing and that HUD could issue administrative policy directives permitting such changes for Ginnie Mae transactions. HUD invites public comment or suggested alternatives with respect to that issue. The major changes to the HUD Multifamily/Multistate Note follow and the section numbers cited below refer to sections in that note.

Personal Liability (Section 8). The HUD Multifamily/Multistate Note limits personal liability. It is a non-recourse Note. The version currently in use does not have a non-recourse provision in the printed form, though personal liability language was permitted by a HUD Handbook. The revised HUD Multifamily/Multistate Note identifies exceptions to the limit on personal liability in the Security Instrument, Regulatory Agreement, and the Note. The HUD Multifamily/Multistate Note identifies six exceptions to the limit on personal liability. A Borrower will be personally liable if the Borrower commits any of the six so-called “bad boy” acts identified in the exceptions. The “bad boy” acts concern the failure to pay the Lender rents after an event of default, failure to apply insurance or condemnation proceeds as required by the Security Instrument, the failure to deliver books and records, acquisition of property or operation of a business in violation of the Security Instrument, transfer or granting of a lien or encumbrance, and fraud or misrepresentation.

Key Principal (Section 1). The revised HUD Multifamily/Multistate Note adds a new defined term for “Key Principal” which will be discussed in an Office of Housing directive. The forthcoming Office of Housing directive will explain how to determine who will be a Key Principal. The Key Principal will be personally liable for “bad boy” acts.

Attachment to the Note. The HUD Multifamily/Multistate Note includes the attachment entitled Acknowledgment and Agreement of Key Principal to Personal Liability for Exceptions

to Non-Recourse Liability. This document will make the Key Principal financially liable for “bad boy” acts.

3. Regulatory Agreement (HUD 92466M).

HUD extensively modified the Regulatory Agreement with the main change being a consolidation of all the various rental housing projects currently in use into one document. HUD drafted a separate Regulatory Agreement for its health care facilities. Lenders, Borrowers, and project managers often complained about the number of forms and the duplication of information required by the various forms. Therefore, an effort was made to evaluate all of the various Regulatory Agreements currently being used, as well as other forms executed by Borrowers in an effort to determine which forms could be consolidated without unnecessary complication. Additionally, none of the current forms had been amended for many years, and some did not fully reflect current administrative policy requirements. HUD reorganized the Regulatory Agreement by topics for ease of use, included current policy and administrative requirements and incorporated the Mortgagor’s Certificate into the proposed Regulatory Agreement.

HUD spent considerable time analyzing the issue of whether to develop a separate format to cover the Section 232 Health Care Facilities program (nursing homes, intermediate care facilities, assisted living facilities and board and care homes). The final decision was to develop a separate Regulatory Agreement for health care facilities. In developing a Regulatory Agreement that will work for the various rental housing programs (excluding the FHA subsidy programs under which projects are not being initially insured any longer), great care was taken to be certain that all provisions are consistent with current administrative policy of HUD.

The proposed Regulatory Agreement is not designed to be used in all cases where there is a Transfer of Physical Assets, if the transfer involves a project which was initially insured under

one of the FHA subsidy programs (Section 236 Interest Reduction Program (IRP), Rental Assistance Program (RAP), 221(d)(3) Below Market Interest Rate (BMIR), Rent Supplement, etc.) In these cases it will be necessary to develop a transactional specific Regulatory Agreement based on a combination of as much of the new format as will be compatible with those provisions of the existing Regulatory Agreement, such as those pertaining to occupancy and rental and which are mandated by the subsidy program statutes or regulations. On the other hand, the proposed format can be used for a transfer of an unsubsidized rental project and with few, if any, changes.

Article I – Definitions. The definitions are found in Article I at the beginning of the proposed Regulatory Agreement. In the existing Regulatory Agreement, the definitions are found near the end of the Regulatory Agreement. Most of the definitions in the Regulatory Agreement are the same as the definitions in the proposed Security Instrument, and many are similar to definitions found in the Freddie Mac closing documents.

Section 1(a): “Affiliate” is a new term. The definition is taken from 24 CFR 24.105.

Section 1(b): HUD decided to use the term “Borrower” instead of “Owner” or “Mortgagor” so that the same terms would be used in the Regulatory Agreement and the Security Instrument. HUD finds this term to be more universal than the term “Mortgagor”. The definition of Borrower is expanded to make it clear that the definition includes a purchaser of the development that does not assume the Security Instrument.

Section 1(d): “Directives” is a new term and includes prospective issuances of HUD as well as ones effective on the date the HUD Multifamily/Multistate Note was first insured.

Section 1(p): HUD added an expanded definition of “Mortgaged Property” including other defined terms, such as “Fixtures” (Section 1(g)) and “Personalty” (Section 1(s)), which are not defined in the current Regulatory Agreements.

Section 1(x): HUD added a definition for “Reasonable operating expenses” to clarify current policy.

Section 1(aa): HUD chose to use the term “Security Instrument” instead of “Mortgage.” HUD finds this term to be more universally understood and used in multifamily project closing transactions than the term “Mortgage.”

Section 1(z) and Section 1(bb): The proposed Regulatory Agreement collectively covers more programs and types of developments than each of the current agreements. For this reason, the proposed Regulatory Agreement defines both “Surplus Cash” (Section 1(bb)) and “Residual Receipts” (Section 1(z)).

Section 1(ee): “Waste” is a new definition and is the same as the definition of “Waste” in Section 1(cc) of the proposed Security Instrument. Section 21 of the proposed Regulatory Agreement prohibits the Borrower from committing Waste.

#### Article II – Construction.

Sections 2 - 9: HUD decided to merge the Mortgagor’s Certificate (FHA Form No. 2433) into the proposed Regulatory Agreement.

### Article III - Financial Management.

Section 11(b): HUD added a provision providing for periodic review of the amount to be deposited in the reserve for replacement fund.

Section 11(c): HUD added a provision requiring that interest earned on the reserve for replacement fund be deposited into that fund.

Section 11(d): HUD added a provision permitting HUD to direct the application of the reserve for replacement fund at any time.

Section 15(b): HUD added additional conditions under which the Borrower may take Distributions.

Section 15(e): HUD clarified when the Borrower may be reimbursed for equity or capital contributions.

Section 19: HUD added a provision concerning the maintenance and inspection of books and records of management agents and Affiliates.

Article IV Project Management. Most of the provisions of this Article represent an elaboration of provisions currently found in the HUD Regulatory Agreement, HUD-92466.

Section 21: This provision derives from the current paragraphs 7 and 9 and expresses the requirement that the Borrower maintain the property and the books in satisfactory condition and that this obligation is independent of any obligation of any other entity or person.

Section 22: This provision requiring flood insurance in flood hazard areas is new to the Regulatory Agreement, but is not a new requirement for Borrowers.

Sections 23, 24, 25, 26 and 27: These provisions derive from paragraph 9 of the current Regulatory Agreement. Section 23 requires execution of a Management Agreement and Management Certification. Section 25 requires that the Management Agreement and any third



party vendor contract entered into by the Borrower be terminable at the request of HUD. Section 26 provides expanded guidance for contract acquisition and management by the Borrower. Section 27 continues the existing requirement that the Borrower be responsive to inquiries from HUD regarding the operation and management of the Project.

Section 28: This provision derives from the regulations at 24 CFR part 245, as amended by the regulations published on June 7, 2000, at 65 FR 36272. This provision explains rights of tenants to organize and gives tenants remedies against Borrowers who unreasonably interfere with these rights.

Section 29: This provision derives from the current paragraph 10 and provides a remedy for HUD in the event that the Borrower fails to comply with a law that is relevant to the management of the Project.

#### Article V - Admissions and Occupancy.

Section 40: HUD clarified that the Borrower may not charge a resident or applicant an admission fee, founders fee, continuing care retirement community fee, life-care fee or similar payment.

Article VI - Actions Requiring the Prior Written Approval of HUD. This Article prohibits certain actions without the prior written approval of HUD.

Section 42(a): This provision maintains provisions in the Regulatory Agreement currently in use that restricts the alienation of real and personal property of the Project. However, unlike the Regulatory Agreements currently in use, this section of the revised Regulatory Agreement establishes exceptions permitting disposal of obsolete or deteriorated equipment and conveyance of property by operation of law.

Sections 42(b), (c), (d), (e), (g), (h): These sections contain provisions substantially equivalent provisions to those in the Regulatory Agreements currently in use. Clarification and improved wording is the primary purpose of any variations from prior instruments.

Section 42(f): The Regulatory Agreements currently in use restrict the right of the Borrower from conveying its general partnership interests; this provision extends that restriction to other interests, in recognition of other forms of Borrower entities being utilized.

Section 42(i): This provision is not contained in Regulatory Agreements currently in use. The provision is designed to avoid a claim by the Borrower that certain of its money is an endowment which is not permitted to be used to pay Project debt or expenses. The provision will permit such a claim only if the money is clearly part of such a restricted endowment.

Section 42(j): This provision, restricting the Borrower's right to change provisions of its organizational documents, is not found in the Regulatory Agreements currently in use. However, this provision is compatible with provisions that HUD has traditionally required to be contained in the Borrower's organizational documents themselves.

Section 42(k): This provision, regulating the institution and settling of litigation by the Borrower above \$25,000, is not found in Regulatory Agreements currently in use. The inclusion of this provision by HUD represents a decision by HUD to apply a consistent policy to all programs and to clearly state that policy in the Regulatory Agreement.

Section 42(l): This provision, prohibiting reimbursement without the prior written approval of HUD, is not found in Regulatory Agreements currently in use. However, the provision is consistent with existing HUD policy that prefers that the Borrower or project manager pay the expenses of the project directly rather than by reimbursing another for these expenses.

Section 42(m): This provision, prohibiting receipt of various fees or payments, is not found in Regulatory Agreements currently in use.

#### Article VII – Enforcement.

Section 43(b) and (c): HUD added additional items which shall constitute a violation of the Regulatory Agreement. These include fraud or material misrepresentations by the Borrower, its officers, directors, trustees, general partners, members, managers or managing agent in connection with certain documents submitted to HUD or requests for HUD's consent to any proposed action.

Section 44: In this section, HUD clarified the circumstances under which it may declare a default following the existence of a violation.

Section 44(b): This section provides that instead of being merely able to request the holder of the HUD Multifamily/Multistate Note, when the note is not held by HUD, to accelerate the HUD Multifamily/Multistate Note following a declaration of default, HUD will have the discretion to require the holder of the HUD Multifamily/Multistate Note to accelerate the Note following the declaration of default. There is a corresponding provision in the Security Instrument at Section 10.

Section 44(g): HUD added a new provision to provide for the removal of certain persons from a role in ownership of the Mortgaged Property with respect to violations of the Regulatory Agreement related to felony criminal convictions or civil judgments concerning the operation or management of the Mortgaged Property.

Section 45: HUD added a new provision to provide a measure of damages for failure to maintain the Mortgaged Property as required by the Regulatory Agreement.

#### Article VIII – Miscellaneous.

Sections 47, 48, 49, 51: These sections contain provisions substantially equivalent to provisions found in Regulatory Agreements currently in use. Clarification and improved wording is the primary purpose of any variation from prior instruments.

Section 50: This provision, concerning the effect of section headings and titles, is not found in Regulatory Agreements currently in use. However, it is a standard contractual provision.

Section 52: This provision for parties' addresses for purposes of providing notice is not found in Regulatory Agreements currently in use. However, it is a standard contractual provision.

Section 53: This provision, pertaining to the Regulatory Agreement as a Uniform Commercial Code (UCC) security agreement, a fixture financing statement and the granting to HUD of a security interest, and related matters, is not contained in current Regulatory Agreements.

Article IX - Section 8 Housing Assistance Payments Contracts. Currently HUD has a different form of Regulatory Agreement (HUD-92465) for developments with project-based Section 8 assistance. HUD includes Article IX in order to make a uniform Regulatory Agreement applicable to insured projects with Section 8 rental assistance.

In Sections 54(a), the definition of "Section 8 units" expands the current definition in Section 16(j) of HUD-92465 to clarify that "Section 8 units" does not include Section 8 certificates, vouchers or housing choice vouchers. The other sections in Article IX were in HUD-92465. Section 54(b) corresponds to Section 16(k) of HUD-92465. Sections 55, 56, and 57 correspond to Sections 5(a), (b) and (c) of HUD-92465. Sections 58, 59 and 60 correspond to Sections 9(a), (b) and (c) of HUD-92465.

#### 4. Regulatory Agreement for Health Care Facilities (92466M-HCF).

HUD extensively modified the Regulatory Agreement formats that are currently in use. The main change is consolidation of all the various rental housing project and Health Care Facility (excluding hospitals) Regulatory Agreements currently in use into two new documents (one for rental projects [92466M] and one for health care facilities [92466M-HCF]). Aside from containing numerous provisions pertaining exclusively to health care facilities insured under Section 232 of the National Housing Act and the elimination of provisions which apply exclusively to rental housing (mainly admission and occupancy, Section 8 assistance, etc.), the 92466M-HCF is much the same as the 92466. The discussion of the 92466M includes a discussion of the provisions used in both documents.

In virtually all instances the 92466M-HCF is consistent with current HUD policy. However, there is one area of current HUD policy that requires clarification and therefore, HUD is specifically bringing this clarification to the attention of the public. That policy is that health care lessees are regulated to the same extent that mortgagors are regulated in the Section 232 program. Clarification is needed because the existing lessee regulatory agreement (Form 2466-NHL) contains few regulatory requirements and, consequently has created numerous questions and conflicts with lessees or operators or both.

In view of increasing conflicts and defaults in the Section 232 program, HUD's Office of Inspector General undertook an investigation, which resulted in a report with recommendations that are incorporated in the Health Care Facility Regulatory Agreement. Attention is called to the formatting of 92466M-HCF. The initial formatting of the 92466M-HCF on pages one and two differs from the "rental project" 92466M in that there are check boxes for the various types of facilities eligible under the Section 232 program, e.g. nursing homes, intermediate care facilities,

board and care facilities, assisted living facilities and combinations. The 92466M-HCF also requires the insertion of data pertaining to the number of beds and/or units. In the opening paragraphs of the 92466M-NHL, HUD clarifies that the instrument covers Borrowers, Lessees and/or Operators. This terminology appears throughout the instrument.

Article I – Definitions. The definitions are found in Article I at the beginning of the proposed 92466M-HCF. Definitions are found near the end of the current forms of Regulatory Agreement. Most of the definitions in the 92466M-HCF are precisely the same as the definitions in the rental housing Regulatory Agreement and the proposed Security Instrument. Many definitions are similar to definitions found in the Freddie Mac closing documents. However, a few definitions are unique to the 92466M-HCF. For example, please see in Section 1, b, c, d, i, j, l, q, s, u.(15), x, y, z, bb, dd, gg, and jj. Specifically, the definition of “Leases,” in the 92466-HCF, includes the Admission Agreement, which is a form of lease used between a resident and an ALF, B & C home or Nursing Home. The definitions of Operator and Lessee are particularly significant and the use of these terms in the 92466-HCF is important in understanding the expanded controls over Lessees and Operators. Some common definitions have been altered to fit the concept of a health care facility.

Article II – Construction. See 92466M discussion of these provisions.

Article III - Financial Management. See 92466M discussion of these provisions and, in addition, see Sections 12 pertaining to the Sinking Fund, 18 pertaining to books of management agents, Lessees, Operators, managers and Affiliates, and 19 pertaining to the Annual Financial Audit. These sections contain additional provisions related to the coverage of Lessees and Operators in health care facilities.

Article IV Project Management. Some of the provisions of this Article are consistent with the 92466M. However see: Section 20. Equipment; Section 21. Licensure; Section 22. Bed Capacity; Section 23.b. pertaining to coverage of Lessees and Operators; Section 24. Prohibition of Additional Fees (e.g. fees for life-care, etc.); Section 25. Coverage; Section 26. Residency of ALF's; and Sections 28-34. pertaining to coverage of Lessees and Operators. One significant change is in Section 34, Compliance with Laws, which requires maintenance of the requisite level of professional liability insurance as determined by HUD.

Article V - Lease of Health Care Facility. Section 35 is most explicit in describing additional regulatory controls applicable when a Health Care Facility is leased and in articulating fully the concept that a Lessee and Borrower together are generally subject to the same regulatory controls as a Borrower where no lease is involved. Significantly, Lessees are responsible for the same level of financial reporting, securitization of all Personality, and agreeing that the Certificate of Need and license cannot be transferred from the Project.

Article VI - Actions Requiring the Prior Written Approval of HUD, Article VII – Enforcement and Article VIII, Miscellaneous. These Articles are virtually the same as those in the 92466M. See the discussion there [where? the "discussion of 92466M"] of the Sections in Articles VI, VII and VIII. In addition, please note that Section 46, pertaining to Notices, specifically covers Lessees and Operators.

##### 5. Mortgagee's Certificate (HUD 92434M).

The Mortgagee's Certificate is substantially the same as the current form. Several minor changes were made from the current form for clarity and ease of comprehension relating to organization and word choice. Also, in the interest of uniformity, the definition of any

capitalized term used in the Mortgagee's Certificate can be found in the Regulatory Agreement and/or the Security Instrument. The following substantive changes were made:

Paragraph 1: HUD added a provision stating that the Lender agrees to be bound by all directives of HUD. Although Lender cannot be adversely affected by changes in regulation, HUD should be able to freely interpret its statutes and regulations. It would be problematic to apply the mortgagee letters and handbooks exactly as they existed at firm commitment for each Project. In order to participate in the program, the Lender must agree to comply with current mortgagee letters and handbooks throughout the life of the mortgage loan so long as they do not conflict with the regulations from the time of the firm commitment.

Paragraph 5: HUD changed the requirement for "clear title" to the language that mirrors the requirements for title at 24 CFR 207.258(b)(2)(ii) and (iii).

Paragraph 7: HUD removed the specific contractual provisions with respect to the creation and handling of the Working Capital Deposit and created a separate Working Capital Escrow Agreement that will be referenced in and attached to the Mortgagee's Certificate.

Paragraph 8: HUD removed the specific contractual provisions with respect to the creation and handling of the Sinking Fund and created a separate Sinking Fund Agreement that will be referenced in and attached to the Mortgagee's Certificate.

Paragraph 13: HUD added the requirement that the Lender is responsible for timely filing of the appropriate Financing Statements under the UCC on behalf of HUD pursuant to HUD's rights under the Regulatory Agreement.

Paragraph 19: HUD amended this provision to require that HUD be included as a named insured in hazard insurance policies for the Project consistent with the new form of mortgage.



Paragraph 20: HUD amended the current Mortgagee's Certificate that previously included items which are to be paid (such as extension fees) in clauses (b), (c), (d) and (e) of paragraph (2) to include only items to be paid at or before initial closing. Deferred fees and charges of all kinds are now addressed only in paragraph 20(f). Further, the HUD added clause (g) of paragraph 20, which allows the Lender to collect servicing and administrative fees. HUD also added clauses (h) and (i) to paragraph 20 to advise HUD if the construction and/or permanent loan is being funded by GNMA mortgage-backed securities or participation certificates in order to address the concern that HUD offices are inconsistent with their requirements to disclose information regarding the underlying financing arrangements of the transaction.

Paragraph 25: HUD included a certification that the Lender has no identity of interest with the Mortgagor.

Paragraph 26: HUD included a certification that the Lender has no identity of interest with the Borrower's attorney to mirror the requirement from the Borrower's attorney opinion.

Paragraph 29: HUD added a certification that all of the closing documents (indicated on the closing checklist and with the exception of the Opinion by Counsel to the Borrower) are in accord with the HUD format documents except as revised and approved by HUD Field Counsel. The Lender will draft a memorandum listing any and all changes to the HUD-approved forms. HUD's approval of the changes will occur by acceptance of the documents and the memorandum listing the changes at the closing. In order to clarify what documents were accepted at the closing, a list of all documents accepted at the closing will be signed by the HUD closing attorney, the Lender and the Borrower. HUD also added the following language "[i]t is understood that changes and modifications do not include filling in blanks, attaching exhibits or

riders, deleting inapplicable provisions or making changes authorized by applicable HUD regulation, handbooks and/or directives.”

Paragraph 30: HUD added a requirement that the Lender immediately notify HUD in writing upon learning of any violation of the Regulatory Agreement.

Paragraph 31: HUD added a requirement that the Lender promptly review any Borrower’s request to transfer the Project and not unreasonably withhold approval of the transfer. If HUD approves the transfer, the Lender will execute a Release and Assumption Agreement or a Mortgage Modification Agreement incorporating the Regulatory Agreement in the Mortgage. HUD also prohibited the Lender from collecting any fee in connection with reviewing the transfer except for reimbursement of actual expenses incurred in connection with reviewing the transfer.

#### 6. Building Loan Agreement (HUD-92441M).

The Building Loan Agreement, HUD 92441 (5-84), remains largely unchanged. There were minor grammatical and style changes made to the text. The substantive changes were as follows:

The first factual recital was revised to reflect all forms of approved mortgagors, including partnerships and limited liability companies.

Paragraph 1 was revised to require submission of closing documents and completion of the initial closing before mortgage proceeds may be advanced.

Paragraph 3 was revised to require approval of all construction changes by the lender and HUD. This reflects existing HUD policy and procedure.

Paragraph 5 was revised to include the permanent loan fee, legal, organizational and audit in the itemized list of charges.

Paragraph 12 was revised to remove the words “upon completion”, which would change the text to require the security agreement and financing statements to be submitted with all other documents at the time of the initial closing.

Paragraph 14 was revised to follow the text of Section 212(a) of the National Housing Act.

Paragraph 19 was added to acknowledge the personal liability of the borrower if mortgage advances are not applied in accord with the requisitions and the Building Loan Agreement. This is a clarification of HUD's policy and reflects HUD's interpretation of the form currently in use.

Paragraph 20 was added to clarify that HUD is not a party to the Building Loan Agreement.

7. Supplement to Building Loan Agreement (HUD 92441M-SUPP).

The Supplement to the Building Loan Agreement, form HUD 92441, is to be used when the Borrower acts as its own general contractor and there is no construction contract. This form is used infrequently. The revised Supplement does not have any substantive changes. Some editorial changes were made, and the references to forms have been updated to refer to the new form numbers.

8. Construction Contract (HUD 92442M).

The existing HUD construction contracts, HUD Forms 92442-Lump Sum, and 92442-A-Cost Plus, were consolidated into a single HUD Construction Contract. The consolidation of the two contract formats was based upon a determination that the HUD construction contracts currently in use are more similar than different, and, the identical and distinct provisions of the construction contracts could efficiently be adapted to a consolidated format. HUD also

determined that a separate form was not necessary to take advantage of the Incentive Payment for Early Completion. Note that the Incentive Payment Computation Form, page 2 of HUD-92443, has not been removed and it is referenced as a contract document in Article 2, Section A.7, of the consolidated construction contract.

HUD gave consideration to including the full text of the Labor Requirements, currently set forth in the Form HUD-2554, within the body of the contract. HUD determined not to include those requirements, because to do so would unnecessarily lengthen the construction contract.

HUD considered the possibility of adhering to a construction schedule culminating with payment upon Substantial Completion, rather than payment upon Final Completion. HUD's Office of Housing determined that the best interests of the Department are served by retaining the Final Completion requirement, to preserve rights attendant to warranty items and liquidated damages. The terms "Final Completion" and "Final Completion Deadline" are clarified in Article 3, Section A.

Significant changes to the HUD consolidated construction contract include the following:

- a. The format, page one, provides for designation as either a Lump Sum or Cost Plus contract, insertion of the Project Number, and identification of the parties to the contract.
- b. The contract documents recited in Article 2. Section A expressly includes the project manual, the Incentive Payment Computation form (if applicable), and the Prevailing Wage Determination.
- c. The mandatory arbitration provisions contained in the AIA A201-1997 General Conditions are expressly excepted from the HUD contract, in Article 2.A.2.

d. The provisions for the payment of incentives for the early completion of construction have been set forth explicitly in the body of the contract, as explained in Article 3. F. For Cost Plus contracts, where there is no Identity of interest between the Owner and the Contractor, the incentive provision is stated in Article 4. D. Where there exists such an Identity of Interest, the incentive provision is stated in Article 4.E. For Lump Sum contracts, the incentive provision is stated in Article 4A. B. The contract language is based upon the provisions currently found in Form HUD-92443 (3/94) and in paragraph 1-15. B. 2. of Handbook 4430.1.

e. Payment Procedures found in Article 5 require the contractor to execute and submit all final advance documents required by HUD as a condition precedent to payment of final balance due to the contractor.

f. The Contractor, pursuant to Article 6, is expressly authorized to withhold payment from the subcontractor(s) in an amount reflecting percentages actually retained from payments to the contractor on account of such subcontractor's portion of the work.

g. References to "HUD requirements" in Article 7 Section E. include "HUD Administrative Requirements" with the intent of reaching all forms of relevant issuance such as Handbooks, Guidebooks, Program Notices, Mortgagee letters, and other written directives issued by HUD relating to the HUD Multifamily or Health Care Facility insurance programs under the National Housing Act, as amended, and any successive legislation.

h. The relationship between state law considerations and lien waiver requirements is addressed in Article 9.B. Article 9.B. states: "In jurisdictions where permitted by law, the Owner may require the Contractor to execute a Waiver of Liens which shall be recorded prior to the commencement of construction."

i. A new Article 12 clarifies the roles of Lender and HUD, disclaiming imputed liability to HUD or the Lender as a result of action or inaction of the Owner, Contractor or any third parties.

j. A new Article 14 provides for designation of the Owner and Contractor representatives responsible for communications involving the contract.

9. Supplementary Conditions of the Contract for Construction (HUD-92554M).

This revision to the form Supplementary Conditions of the Contract for Construction is substantially the same as the current Form HUD-2554. However, this draft is designed explicitly for use in the FHA program and not for use in the Section 202, Section 811 or in other HUD programs. This draft form is subject to further internal review by HUD to adapt this form for use in transactions under Section 202 and Section 811. It was originally included within the body of the Merged Construction Contract posted on HUD's website on March 31, 2000, with other draft forms for use in multifamily project and facility closings. Upon further consideration and based on several comments received by this office, the decision was made to retain the form of the Supplementary Conditions for use as a separate instrument rather than include it within the body of the construction contract form.

In the interest of clarity and ease of comprehension, several changes were made to current Form HUD-2554 including punctuation, citations and cross-references, and a few subsection numbers were changed. The following additional changes were also made to the form:

a. The instructions contained at the beginning of Article I (the paragraph headed "Instructions") were removed, and appropriate language with respect to the applicability of

paragraphs B, C and D (formerly A, B, and C) was added at the beginning of each appropriate paragraph itself. See the discussion for paragraphs 1.B, 1.C and 1.D that immediately follows.

b. Paragraph 1.B (Minimum Wages) now opens with a statement describing projects exempt from the minimum wage provisions contained therein.

c. Subparagraph 4 (i) of paragraph 1.B is updated to reference the current name for the office within the Department of Labor responsible for apprentice and trainee programs. The current name of the office is "Office of Apprenticeship Training, Employer and Labor Services" which was formerly known as the "Bureau of Apprenticeship and Training."

d. Subparagraph 6 of paragraph 1.B now refers to the clauses in subparagraphs 1 through 10 of paragraph B in lieu of referring to the comparable clauses of 29 CFR 5.5(a), in identifying minimum wage provisions to be inserted in subcontracts.

e. Paragraph 1.C (Contract Work Hours and Safety Standards Act) now starts with a subparagraph numbered 1 that states: "This paragraph C of Article 1 is applicable only if a direct form of federal assistance is involved, such as Section 8, Section 202/811 Capital Advance, grants etc., and is applicable only where the prime contract is in an amount greater than \$100,000. As used in this paragraph C, the terms 'laborers' and 'mechanics' include watchmen and guards."

f. Subsection 1.D (Certification) now starts with the following phrase that identifies the scope of the certification: "For projects with mortgages insured under the National Housing Act that are subject to paragraph B of this Article 1."

g. Article 2 (Equal Employment Opportunity) was revised to remove the language provided in the beginning of the Article that states that an obligation on the part of an "applicant" to incorporate certain provisions in construction contracts. HUD determined that language is not

appropriate for inclusion within the body of the form, since the form itself is designed to be included in construction contracts (as an attachment) and not to be included in grant agreements or application forms.

h. Article 2, subsections B and C (formerly A and B), were revised to include reference to persons with disabilities as a protected class.

i. Article 2, subsections H, I and J, were removed because it was determined that these provisions relative to the agreements and obligations of "the applicant" were not appropriate for inclusion in this construction contract document. Rather, these provisions should be included in other, more appropriate instruments.

j. Article 3 (Equal Opportunity for Businesses and Lower Income Persons Located Within the Project Area), commences with a revised statement (now labeled subsection A) that describes the applicability of Article 3 by simply referring to the regulation at 24 CFR part 135.

k. Article 4 (Health and Safety) now starts with an "applicability" paragraph (labeled paragraph A) that clarifies the scope of applicability of this article and states: "This Article 4 is applicable only where the prime contract is in an amount greater than \$100,000." This new language reflects the fact that Article 4 derives from the Contract Work Hours and Safety Standards Act, which contains such limitation.

10. Opinion by Counsel to the Borrower and Instructions and Certification (HUD 91725M). The guide format for the opinion required by HUD in multifamily rental project and health care facility closings was originally prepared in 1994 in response to changes in opinion practice as reflected by the ABA Accord and various State law bar reports on opinion letters. The proposed revision to the guide format reflects approximately seven years experience with the 1994 version and, as would be expected, contains numerous technical changes and



corrections such as the striking of the requirement that HUD be shown in Financing Statements “as its interest appears.” The principal purpose of the guide format remains, which is to achieve a uniform format which can be utilized throughout the nation and which will be familiar to HUD counsel, Lenders and other parties to the mortgage insurance transactions in all jurisdictions.

The major substantive changes being proposed are as follows:

Instructions to the Guide Format on the Opinion by Counsel to the Borrower. The Instructions have been updated and contain numerous clarifications that should facilitate use of the guide format in preparing the Opinion by Counsel to the Borrower (Opinion). The Instructions describe and explain the rationale for the major changes to the guide format, e.g. the section pertaining to the UCC, reliance by successors and assigns of the Lender, certification as to the guide following the format provided by HUD, stronger certification/warning language in the Opinion and virtually all other closing documents being reviewed by Counsel to the Borrower, etc. Note specifically the discussion of acceptability of counsel, signatures, certification of the mortgagor, identity of interest, liens, certifications as to Regulatory Agreement and side-deals, reliance on other opinions and reliance by subsequent holders. Further, the Instructions contain considerably greater guidance and numerous clarifications as to when and how the guide format is to be utilized, e.g. as to which programs and which closings the guide form is applicable, as to how the guide format can or should be modified, etc.

Section 13. This section and several related provisions pertaining to securitization of the Lender and HUD under the UCC have been revised to reflect the fact that the Lender now has to also prepare an appropriate Security Agreement and Financing Statements to securitize HUD as well as the lender. It is also likely that the Opinion will have to be updated at final endorsement

to properly cover the UCC securitization, particularly for health care facilities where the proper documentation under the UCC cannot be prepared until completion of the project or facility.

Certification by Mortgagor. See Section 8 related to identities of interest and side-deals.

C. Miscellaneous Documents.

1. Residual Receipts Notes (HUD-91710M and 91712M). Each proposed Residual Receipts Note format has been revised to incorporate directive requirements into the text of the notes.

2. Escrow Agreement for Incomplete Construction (HUD-92456M). HUD revised the Escrow Agreement by adding ‘incomplete construction’ to the title of the form. The recital provision has been changed with respect to statement that the Lender is to advance the entire amount of the loan provided for in the Building Loan Agreement. This statement is misleading since the amount of the loan can and often does change at final endorsement. The provision now reads: ‘to insure the Mortgage Loan in its maximum approved amount.’ The form was corrected to remove the Labor Standards Procedures and substitute the Form HUD-92554M, Supplementary Conditions of the Contract for Construction, as the labor standards. Finally, the term ‘cash’ was added to the deposit.

3. Request for Final Endorsement of Credit Instrument (HUD 92023M). No substantive changes were made to this form.

4. Leasehold Instructions with Lease Addendum (HUD 92070M). The revision made to this form clarifies that the instructions and addendum are to be used in connection with a ground lease. The procedures for leasehold termination by reason of tenant defaults and the right to cure defaults are revised to give greater protection to the insured mortgagee and to HUD. Upon

premature termination of the leasehold by reason of tenant defaults, the revision specifically provides that the insured mortgage remains an encumbrance on the improvements.

5. Surplus Cash Note (HUD-92223M). Each proposed Surplus Cash Note format has been revised to incorporate directive requirements into the text of the notes.

6. Completion Assurance Agreement (HUD-92450M). There were no substantive changes made to this form.

7. Payment Bond (HUD-92452M-A). This form includes several revisions. New provisions added to the form include a provision that amounts paid to the Owner without the written consent of the Lender do not reduce the Surety's liability. The cost of equipment was added as an additional item that may be claimed under the bond. An Additional Obligee Rider was attached for cases in which HUD approves an additional obligee on the bond. An Additional Surety Rider was attached for cases in which HUD allows more than one surety. The form was revised to reflect that the one-year time period to bring an action under the bond runs from the date the last labor or service was performed or last materials or equipment were furnished, rather than from the date the Contractor ceased work. Another revision provides that the Surety waives notice of any changes to the construction contract, including changes of time.

8. Performance Bond-Dual Obligee (HUD 92452M). New provisions added to the form include a provision that amounts paid to the Owner without the written consent of the Lender do not reduce the Surety's liability. Also, the Surety must notify Obligees of its failure to make payments or perform obligations and provide time to cure before the Surety can assert Obligee's failure to perform as cause for Surety not to perform. An Additional Obligee Rider was attached for cases in which HUD approves an additional obligee on the bond. An Additional Surety Rider was attached for cases in which HUD allows more than one surety. The form was revised

to reflect that the two-year time period to bring an action under the bond runs from the date the Owner declares the Contractor in default of the contract rather than from the date on which the final payment under the contract was due. Another revision provides that the Surety waives notice of any changes to the construction contract, including changes of time.

9. Request for Endorsement of Credit Instrument Insurance Upon Completion (HUD-92455M). HUD made substantial revisions to the current version of this form that is dated February 1973. Many of the paragraph numbers of the current document have changed and the references that follow are to the paragraph numbers in the proposed document unless otherwise indicated. A space has been provided for inspection fees in the third paragraph. In the Certificate of Mortgagee, paragraph 4 has been expanded to include Section 223 projects. A statement has been added to paragraph 5 to cover Section 223 delayed repairs and latent defect protection. Paragraph 6 has been revised so that it is no longer restricted to Section 232 projects. Paragraph 7 has been added to include the amount deposited into the Reserve for Replacements for Section 223 projects. In paragraph 8, the language has been updated by adding a statement regarding fees and charges. In paragraph 9.b., language has been added that requires Lenders to certify that, in addition to the initial service charge, the Lender receives a servicing fee, which is included in the mortgage rate, an administrative fee for investing the cash held in the Reserve for Replacements and any other interest-bearing escrows required by the Department. Paragraph 9.d has been amended to set out the dollar amount of the permanent placement fee collected by the Lender, in addition to the initial service charge. Paragraph 9.f has been added for bond-financed projects, to disclose the amount collected to cover the cost of issuance. Also, a statement must be attached itemizing and explaining the necessity of each cost. Paragraph 10.g of the current form is obsolete. It has been rewritten and replaced with references to GNMA. Paragraph 10

has been added to cover the rights of HUD during the period of lockout or prepayment penalty. Paragraph 11 regarding the letter of credit has been rewritten to follow the current regulation at 24 CFR 200.63. In the Certificate of Mortgagor, the current paragraph 4 is obsolete, is addressed elsewhere in other forms and has been deleted. Paragraph 7.b in the Certificate of Mortgagor has been expanded to provide space for additional obligations. The Certificate of General Contractor (contractor) has been amended extensively. A signature block has been added for the contractor. In signing the document, contractor will be made a party to the document. Further, the contractor certifies that the contractor will pay the obligations and provide receipts except for unfinished work funded by an escrow.

10. Surveyor's Report (HUD-92457M) and Survey Instructions and Report (HUD-92457A-M). The only change to the Surveyor's Report (HUD-92457M) and Survey Instructions and Report (HUD-92457A-M) was to require surveyors to apply the Minimum Standard Detail Requirements and Classifications for ALTA/ACSM Land Title surveys that were adopted in 1999, rather than the 1992 standards to which the March 1998 version of the form referred.

11. Request for Approval of Advance of Escrow Funds (HUD 92464M). No substantive changes were made to this form.

12. Escrow Agreement for Noncritical, Deferred Repairs (HUD-92476.1M). The Department substantially revised this form. HUD deleted references to Capital Needs Assessments and 241(f) loans and refers in general to Section 223, since repairs can arise under the Section 223(f) and 223 (a)(7) insured loans. As with other escrow forms, if the Depository is the Lender, the term Depository refers to the Lender. The form has been clarified to provide that deposits for the escrows are in cash for both the unpaid construction costs and for delayed repairs and has been made consistent with Housing Notice H99-33. Protective language was added to

cover contingencies, such as, failure to complete the Section 223 repairs on time or in the event of default. In paragraph 8, the provisions of the regulation at 24 CFR 200.63 governing the letter of credit were added.

13. Agreement of Sponsors To Furnish Additional Funds (HUD 92476M). This form was revised slightly to clarify that the deposit to be made by a sponsor is to be pursuant to form HUD 92476aM.

14. Escrow Agreement-Additional Contribution By Sponsors for Operating Deficit (HUD-92476aM). This form was revised slightly to clarify certain aspects of it. A reference to “Operating Deficit” was added to the title to assist the reader in determining at a glance whether it is the needed form. The reference to “bearer bonds” as an acceptable form of the deposit was eliminated as obsolete. Paragraph 4, regarding HUD’s determination that the project has achieved sustaining occupancy and income, has been clarified to show that this determination is within HUD’s sole discretion. At paragraph 5, the essence of the provisions of the regulation at 24 CFR 200.63 governing the letter of credit were added.

15. Bond Guaranteeing Sponsor’s Performance (HUD-92477M). There were no substantive changes made to this form.

16. Mortgagor’s Oath (HUD-92478M). This form was edited for clarification and to more fully comply with the relevant statutes. Specifically, HUD has made reference in each of the first two paragraphs to the section of the NHA upon which the respective requirements are based and, at the same time, has eliminated the recitation of the statutory provisions as unnecessary. In paragraph (1), reference to a prohibition on offering hotel services to tenants was removed. This prohibition is not included in the statute and leads to confusion as to whether a particular project is in compliance with the statute. In paragraph (2), reference was added to

exceptions to occupancy requirements that are permitted by the statutes. The need for the document to be executed as an oath before a notary public has been highlighted, the notary block has been edited to accommodate varying types of entities as signatories, and a second notary block has been added for convenience.

17. Off-Site Bond (HUD 92479M). An Additional Obligee Rider was attached for use in cases in which HUD approves an additional obligee on the bond. An Additional Surety Rider was attached for use in cases in which HUD allows more than one surety. As revised, the bond is a dual obligee bond, with the lender and owner as obligees. The cost of equipment was added as an additional item that may be claimed under the bond. Also, the two-year time period to bring an action under the bond was revised to run from date the Owner declared the Contractor in default, rather than date the off-site improvements were to be installed. Another change is that the Surety waives notice of any changes, including changes of time, to the construction contract.

18. Escrow Agreement for Latent Defects (HUD-92414M). HUD acknowledges that there is no closing document that covers an escrow for latent defects even though current policy requires such an escrow. In most cases, closings are conducted in different offices with the lenders preparing different versions of escrow agreements for the borrower's signature. In order to be consistent HUD has developed the Escrow Agreement for Latent Defects, in which the Depository agrees to hold a fund in a separate account for a stated period of time. The form describes how the Lender shall maintain the fund and how the fund should be administered in the event of assignment or default by the Borrower.

19. Escrow Agreement for Working Capital (HUD 92412M). HUD is proposing a new closing document in response to lenders' requests for a Department-approved form of Escrow Agreement for Working Capital. The new form of Escrow Agreement for Working Capital is

between the Borrower and Depository and makes provision for the Lender to act as the Depository. Current HUD policy is to reflect the working capital escrow in the Mortgagee's Certificate. The Mortgagee's Certificate is not legally adequate to establish a contractual relationship between the Borrower and the Lender since it is a certification from the Lender to HUD, and the Borrower is not a party. The new form recites the project name and location and refers to the terms and requirements of the firm commitment for the project.

20. Sinking Fund Agreement (HUD 92413M). The Sinking Fund Agreement is a new document that requires the Borrower of certain Health Care Facilities (where depreciation is a component of the federal Medicaid reimbursement) to deposit, in a trust fund with the Lender, an amount representing the excess depreciation component of the capital reimbursement per a schedule prepared by the Lender. Currently, requirements for this Sinking Fund are found in the Mortgagee's Certificate. The Borrower is not a party to the Mortgagee's Certificate; therefore, the document is not legally adequate to establish a contractual relationship between the Borrower and the Lender. The current arrangement is cumbersome and is inaccurate in places. The proposed document overcomes the current deficiencies and identifies the rights and responsibilities of the parties more clearly and in a legally enforceable manner.

21. Agreement and Certification (HUD-93305M). The most significant change made to this form was to consolidate the 3305 and 3306 forms as well as a third Agreement and Certification format which was developed during the document reform process for use in the Section 223(f) refinancing program. The proposed form, published with this notice, sets forth separate provisions, where necessary, for use in differing programs, and provides boxes that can be checked to indicate the applicability of a particular provision. Where a provision would apply in any program, no box is necessary. If the final decision of HUD is to consolidate the three



forms, the consolidated form has been designated as the 93305; however, HUD can consider a different number if this creates confusion. Further, HUD revised the form to clarify the definition of identity of interest. The definition adds ‘business interests’ to financial and family relationships and adds ‘partners and principals’ to officers, directors and stockholders. The term Principals is capitalized for the remainder of the form and the expanded definition of identity of interest is added to the provisions regarding the 50%-75% Rule, Builders and Sponsors Profit And Risk Allowance (BSPRA) and Sponsors Profit and Risk Allowance (SPRA). The beginning of Paragraph 10 is revised to clarify that BSPRA is included when HUD processes the project loan application to include BSPRA, rather than providing that BSPRA is automatically included. Modifications to Paragraph (10 b) clarify that when the identity of interest between the borrower and the contractor is not maintained through final endorsement, the BSPRA identity is lost and the borrower will be allowed a SPRA instead of BSPRA. Paragraph 10(c) is rewritten in plain language to explain the 50-75% rule. Paragraph 11 is revised to clarify that if the 50-75% Rule is violated, both the profit and the overhead to the contractor are lost. This is consistent with HUD's mortgage credit guidelines. Paragraph 14 has been expanded to include collateral agreements or side-deals of any kind in connection with the project, not just the financing or borrowing arrangements that are in the current version of this form.

22. HUD Amendment to Owner-Architect Agreement AIA B-181 (HUD-92408M). This document formerly was required by HUD directives to be attached to the contract between the owner and the project architect, and was found as an appendix to a HUD Handbook. It has been updated in content, format and references to HUD’s outstanding architectural instructions. HUD has clarified that the architect’s drawings may be used by a substitute party who takes control of the project in order to complete the work, following failure of the owner to do so, by eliminating

paragraph 6 in the prior version and adding a new paragraph 4. HUD further added the element of timing to the requirement that the owner and architect inform HUD of identities of interest within five working days of the first knowledge thereof.

As noted earlier in this preamble, HUD is proposing conforming changes to certain of its regulations to update these regulations where regulatory language was also identified as outdated and to maintain consistency with the new proposed closing documents that are published with this notice. HUD's related proposed rule is published elsewhere in today's Federal Register.

## **II. Findings and Certifications.**

### **Paperwork Reduction Act.**

The proposed new information collection requirements contained in this notice have been submitted to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520). Under this Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection displays a valid control number.

The public reporting burden for this new collection of information is estimated to include the time for reviewing the instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Information on the estimated public reporting burden is provided in the following table:

Forms	<u>Number of Respon- dents</u>	<u>Frequen- cy of Response</u>	<u>Responses per Annum</u>	<u>Burden Hour Per Response</u>	<u>Annual Burden Hours</u>	<u>Hourly Cost Per Response</u>	<u>Annual Cost</u>
HUD-91710M	1200	1	1200	0.5	600	\$26	\$15,600
HUD-91712M	1200	1	1200	0.5	600	\$26	\$15,600
HUD –	1200	1	1200	1	1200	\$26	\$31,200

92023M							
HUD – 92070M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92223M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92408M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92412M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92413M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92414M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92450M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92452A-M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92452M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92455M	1200	1	1200	1	1200	\$26	\$31,200
HUD – 92456M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92457A-M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92457M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92464M	1200	1	1200	1	1200	\$26	\$31,200
HUD – 92476.1M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92476A-M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92476M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92477M	1200	1	1200	0.5	600	\$26	\$15,600
HUD – 92478M	1200	1	1200	0.5	600	\$26	\$15,600

HUD-92479M	1200	1	1200	0.5	600	\$26	\$15,600
HUD-91725M	1200	1	1200	2	2400	\$26	\$62,400
HUD-91725M-CER	N/A	1	N/A	N/A	N/A	N/A	N/A
HUD-91725M-INST	N/A	1	N/A	N/A	N/A	N/A	N/A
HUD-92434M	1200	1	1200	0.75	900	\$26	\$23,400
HUD-92441M-SUPP	1200	1	1200	0.75	900	\$26	\$23,400
HUD-92441M	1200	1	1200	1	1200	\$26	\$31,200
HUD-92442M	1200	1	1200	1	1200	\$26	\$31,200
HUD-92466M	1200	1	1200	0.75	900	\$26	\$23,400
HUD-92466M-HCFRA	1200	1	1200	0.75	900	\$26	\$23,400
HUD-92554M	1200	1	1200	0.2	240	\$26	\$6,240
HUD-94000M	1200	1	1200	0.75	900	\$26	\$23,400
HUD-94001M	1200	1	1200	1	1200	\$26	\$31,200
HUD-93305M	1200	1	1200	0.5	600	\$26	\$15,600

In accordance with 5 CFR 1320.8(d)(1), HUD is soliciting comments from members of the public and affected agencies concerning the proposed collection of information to:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- (2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Interested persons are invited to submit comments regarding the information collection requirements in this proposal. Comments must be received by **INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**. Comments must refer to the proposal by name and docket number (FR-4883-N-02) and must be sent to:

Melanie Kadlic  
HUD Desk Officer  
Office of Management and Budget  
New Executive Office Building  
Washington, DC 20503-0001  
Fax number (202) 395-6974  
E-mail [Melanie\\_Kadlic@omb.eop.gov](mailto:Melanie_Kadlic@omb.eop.gov)  
and

Kathleen McDermott  
Reports Liaison Officer  
Office of the Assistant Secretary for Housing- Federal Housing  
Commissioner, Room 9116  
U.S. Department of Housing and Urban Development  
451 Seventh Street, SW  
Washington, DC 20410-8000

### **III. Closing Documents**

The individual closing documents follow and HUD welcomes comment on these documents.

**Date:** June 29, 2004

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Sean Cassidy, General Deputy Assistant Secretary  
for Housing

**(FR-4883-N-01)**